IN THE COUNTY COURT AT CENTRAL LONDON Case No. C20CL075

TECHNOLOGY AND CONSTRUCTION LIST

His Honour Judge Edward Bailey

Between:

(1) LAHRIE MOHAMED
(2) SHEHARA LAHRIE

Claimants

- and -

(1) PHILIP ANTINO
(2) RAYMOND STEVENS

Defendants

JUDGMENT

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1. Before the Court is the Claimants' Part 8 Claim for a declaration and injunctive relief in connection with a party wall matter. It is properly a Part 8 Claim, there being little if any dispute of fact. In issue between the parties are matters fundamental to the dispute resolution procedure imposed on neighbouring property owners by s.10 of the Party Wall etc. Act 1996.

Factual background

2. The Claimants are the owners of 59 Manor Road, Chigwell, Essex, a substantial residential property. In 2014 the Claimants wished to carry out extensive works of development and refurbishment to their property, works which included the construction of a multi-layered basement development, including lifts to take cars to underground parking, a sub-level swimming pool, and a sunken garden to the rear of the property. These works necessitated extensive excavation up to the property's boundaries, works which were notifiable under the provisions of s.6 of the 1996 Act.

3. In 2015 the Claimants served the requisite statutory notices on the adjoining owners. Their neighbours at 57 Manor Road were Sukhbinder Singh Takhar, Iqbal Kaur Takhar and Pirthipal Singh Takhar ("the Takhars"). On receipt of the party wall notices the Takhars appointed Mr Philip Antino, the First Defendant, as the adjoining owners party wall surveyor under section 10(1)(b) of the Party Wall etc Act 1996 ("the 1996 Act"). The Claimants had appointed Mr Michael Osborne as the building owner party wall surveyor. In accordance with s10(1)(b) of the 1996 Act Mr Osborne and Mr Antino

proceeded to select Mr Raymond Stevens as the third surveyor. Mr Stevens accepted the selection on 9 February 2015.

4. Due to the complexities of the subterranean development, Mr Antino referred the scheme to Mr Leslie Calder, an engineer appointed to advise the adjoining owner. Mr Calder suggested changes to the design which were accepted by the building owners' engineers. The scheme was redesigned in line with the alternative proposals advanced by Mr Calder, which proposals involved a 'top-down' construction. The redesigned scheme still involved very substantial excavation, requiring some 900 cubic metres of soil and other waste material to be removed. A substantive award authorising the excavation for and formation of a piled basement in accordance with the revised scheme was made on 4 August 2015. Shortly thereafter, on 8 September 2015, Mr Osborne declared himself incapable of acting, and the building owners appointed Mr Redler in his place. Whether Mr Redler's appointment as the building owners' surveyor was effective from 9 September 2015, when it was made, or from 30 September 2015, as Mr Antino (with some justification) contends, is of no consequence to the issues before the court.

5. The works did not proceed with any degree of harmony. The precise details of the various discords between the Claimants and the Takhars have no immediate relevance to the issues in this claim. Suffice it say that, in the words of Mr Isaac, counsel for the Claimants, "the Mohameds and the Takhars descended into a flurry of litigation, so that, in the following months, the following proceedings were commenced and pursued:

   (1) Claim no. B20CL134 – Mohameds' claim challenging (on the basis of lack of jurisdiction) an ex parte award made by Mr Antino covering his fees and Mr Calder's disbursements dated 24 September 2015, issued 27 October 2015;

   (2) Claim no. C20CL012 – Takhars' claim for an injunction for breach of the substantive award, issued 12 February 2016;

   (3) Claim no. C20CL044 – Mohameds' appeal against Mr Stevens' award dated 18 March 2016, issued 1 April 2016;

   (4) Claim no. C20CL055 – Takhars' appeal against Mr Redler's award dated 18 April 2016, issued around 21 April 2016."

6. It is unfortunately the case that the discord was not restricted to the parties. An antipathy arose both between owners and party wall surveyors, and in particular between the Claimants, the building owners, and Mr Antino, the adjoining owners' party wall surveyor, and also between the surveyors themselves. The court is in no position to make any comment, let alone adjudicate on the various difficulties encountered either between owners and surveyors, or between the surveyors. However, the antipathy forms part of the background to the issues under consideration and may, at least in part, explain the attitude adopted by the building owners when discussions took place which led to the making of the agreement which has resulted in this litigation.

7. By May 2016 it appears that both sets of owners had wearied of litigation. They decided to hold a mediation, the date for which was set for 10 May 2016. Mr Antino, and presumably the other party wall surveyors (although this is not clear), was invited to

attend the mediation. Mr Antino attended in response to the invitation, but at the door of the mediation chamber Mr Antino was informed that his presence was no longer required. As Mr Antino understands that the Claimants and their solicitor objected to Mr Antino's presence at the mediation hearing. Their reasons are of no consequence to this judgment; plainly parties to litigation must be free to decide who they will or will not allow to attend a mediation hearing. Nevertheless, it is not difficult to understand Mr Antino's concerns as he was made to wait outside the mediation room. In the event it appears that Mr Antino waited for much of the day, and only left when, at some point in the afternoon, he understood that the mediation had been unsuccessful.

8. After Mr Antino had left however, the respective owners (as the parties to the four separate sets of litigation then in progress) held further discussions at the end of which they were able to compromise their litigation differences. A consent order was prepared by counsel attending the mediation and signed on behalf of both sets of owners. The consent order is in Tomlin form and provides for a stay of all the outstanding proceedings, being those noted at paragraph 5 above, save for the purpose of carrying into effect the agreement embodied in the Schedule to the Tomlin Order.

9. The consent order is an important document. A copy is appended to this judgment. By paragraph 1 of the Schedule it was provided:

> "The parties make this agreement in full and final settlement of all matters between them to date save for those explicitly mentioned below, and is in resolution of all disputes between them under the Party Wall etc. Act 1996"

10. It is important to note that while the parties had brought their litigation to an end, so that they no longer needed to call upon the services of the Court, they had in practice compromised none of the various substantive differences between them. These differences remained. The effect of the agreement embodied in the Schedule was to provide both for an alternative method of resolving these existing differences and, furthermore, any additional differences which might arise between them in the future. To this end two adjudicators were to be appointed, a surveyor and an evaluator. Thus Clause 2 of the Schedule provides:

> "The parties agree that all future disputes which would normally be resolved by an award under the Act shall be resolved by an independent surveyor appointed jointly by the parties as set out below ("the Agreed Surveyor"), and who shall resolve (1) the disputes set out below, and (2) any future party wall disputes between the parties arising out of the current works being carried out by the Mohameds as if he were an agreed surveyor appointed under section 10(1)(a) of the Act."

Clause 8 of the Schedule provides:

> "The question set out below shall be referred to Gary Webber as a neutral evaluator ("the Evaluator") to adjudicate upon, and, in the event that he is unwilling or unable so to act, Sara Benbow shall identify and nominate an appropriate third party who can undertake an independent evaluation in his place."

The issues arising in this claim do not concern the question which is to be referred to the evaluator under the parties' agreement.

11. The remaining paragraphs of the Schedule cover the method of appointment of the Agreed Surveyor, the particular areas of existing dispute to be determined by the Agreed Surveyor, and the manner in which the Agreed Surveyor is to resolve these existing and any future disputes. It is necessary only to quote one further provision of the Schedule. The third of the "Current disputes to be determined by Agreed Surveyor" is:

> "(3) What reasonable fees should be paid by the Mohameds to the Takhars in respect of the fees of (a) Philip Antino, (b) Leslie Calder, and (c) Raymond Stevens down to and including the date hereof."

12. It will be seen that the aim of the agreement embodied in the Schedule is to take away from both the party wall surveyors and the Court any involvement in or jurisdiction over both existing and future disputes which arise in connection with matters within the scope of the 1996 Act. The Defendants, as party wall surveyors, are concerned as to their loss of jurisdiction. The Court does not share this concern, but then the Court does not have the financial interest in these matters which the party wall surveyors have.

13. Mr Antino and Mr Stevens were both sent copies of the Consent Order on 16 May 2016, by which time the Consent Order had been approved as an Order of the Court. Neither Mr Antino or Mr Stevens had been told before they received their copies of the Consent Order that the mediation had led to the agreement embodied in the Schedule.

14. There followed communication between the three surveyors, Mr Antino, Mr Stevens, and Mr Redler, not all of which is in the hearing bundle. That matters not. Mr Antino was firm in his opinion that the Consent Order was ultra vires. Mr Antino stated that the effect of the Consent Order was to remove the party wall surveyors from their statutory positions contrary to the wording of s.10(2) of the 1996 Act. ("All appointments and selections made under this section shall be in writing and shall not be rescinded by either party"). On 3 and 8 June 2016 Mr Antino and Mr Stevens each wrote to Mr Goddard, the surveyor the Mohameds and the Takhars had agreed should act as the Agreed Surveyor provided for in the Schedule to the Consent Order, explaining why in their view Mr Goddard could not and should not accept the appointment. By letter dated 7 June 2016 Mr Goddard declined to act, on the basis that the party wall surveyors remained appointed / selected, and that the effect of the agreement embodied in the Schedule was 'to set aside the Section 10 process', something for which there was no legal mechanism under the 1996 Act.

15. On 21 June 2016 Mr Antino wrote to both Mr Redler and Mr Stevens asserting that the Consent Order "attempted, quite wrongly, to rescind our appointments and replace them with the appointment of an Agreed Surveyor". Mr Antino requested Mr Redler and Mr Stevens (expressly under s.10(7) of the 1996 Act) to "enjoin with me to continue as the tribunal of party wall surveyors to bring these matters to a natural conclusion". Mr Antino continued that "if both or one of you decline to respond within 10 days I shall move forward and produce an ex-parte Award" In conclusion Mr Antino stated:

> "I want to be perfectly clear about this, I do not want to act ex-parte, I would like us as professionals and statutorily appointed and/or selected surveyors to deal with matters in the natural course of the Act and bring the matters to a satisfactory conclusion as swiftly and economically as possible. That requires transparency, efficiency and communication."

On 23 June 2016 Mr Stevens wrote to Mr Redler in support of Mr Antino's views.

16. This correspondence was not undertaken in secret. It became plain to the Claimants' solicitors that there was a real risk that either Mr Antino alone or both Mr Antino and Mr Stevens might make a further Award. On 23 June 2016 Mr Hearsum of the Claimants' solicitors sent an e-mail to Mr Antino at 17:13 asserting that:

> "The consent order explicitly removes all existing disputes between the parties. There are therefore no disputes between the building owner and the adjoining owner for the purposes of section 10(10). Therefore neither you, Mr Stevens or Mr Redler has *locus* to make any award at all".

Mr Hearsum asked for an undertaking from Mr Antino not to make or purport to make any award under the Act, failing which an application for an injunction to prevent the making of an Award might be made.

17. Mr Redler did not share Mr Antino's views. In an email to Mr Antino at 13:22 on 24 June 2016, Mr Redler gave his understanding of the position as being that "the consent order does not purport to dis-instruct the appointed surveyors but that it resolves all disputes under the Act between the owners. As such there is no dispute for the surveyors to resolve under section 10. We have no justification for incurring further costs on the matter". Mr Antino responded by suggesting that the fact that Mr Redler held a different interpretation of the Consent Order "is in itself a dispute, it is a matter arising out of or incidental to the notifiable works, that gives rise under s.10(12)(c) and (13)(c) which falls within our jurisdiction to determine".

18. Mr Antino wrote to Mr Stevens on 28 June 2016 (copied to Mr Redler) requesting that, as third surveyor, Mr Stevens should seek submissions on 11 areas of dispute that Mr Stevens should resolve by way of Award. The areas identified were:

    (1) Adjoining Owners damage to property.
    (2) Compensation for nuisance and inconvenience to Adjoining Owners.
    (3) Adjoining Owners checking engineers' fees/costs.
    (4) Reasonableness of the Adjoining Owners' Surveyors conduct attempts to gain access.
    (5) Conduct of the Building Owners' surveyor.
    (6) Conduct of the Building Owners' obstructive behaviour.
    (7) Third Surveyor's fees throughout the whole party wall procedures.
    (8) Clarification on whether the rights of access clause 4(f) (i.e under the substantive award authorising works) required 14 days' written notice.
    (9) Whether Mr Redler's claim that method statements do not exist was professional, reasonable and satisfied clause 4(i).

(10) Whether the Buildings complied with clause 4(i) noted typing error in Award should be (k).
(11) Whether the refusal to allow Mr Antino to attend the trial pit excavation was (i) notifiable works and (ii) breach of clause 4(i).

19. The Claimants then applied for interim injunctive relief to prevent the making of any Award on 28 June 2016. The Defendants gave satisfactory undertakings on 30 June 2016 through to 22 July 2016, and a further consent order was made on 22 July 2016 continuing the undertakings until trial or further order.

The relief sought

20. The Claimants, the building owners, seek two substantive remedies:

(1) A declaration that the Defendants have no locus to make any further awards purporting to determine disputes between the Claimants and the Takhars;

(2) An order that the Defendants be restrained, whether jointly or severally, from making or purporting to make awards under section 10 of the Party Wall etc Act 1996 in relation to any disputes between the Claimants and the Takhars.

The Claimants rely on their agreement with the Takhars, now comprising the Schedule to the Tomlin Order dated 22 July 2016, as precluding the involvement of either Defendant in the determination of any current or future dispute between them arising in connection with the Claimants' works. The Defendants resist the remedies sought. As for the current disputes the Defendants maintain that, as duly appointed party wall surveyors, they are seized of the disputes and it is not open to the owners to make any agreement which has the effect of taking the resolution of the disputes away from them. As for future disputes the Defendants assert that it is not open to the owners, by agreement or otherwise, to contract out of or avoid the operation of the Act.

The Party Wall etc. Act 1996

21. The 1996 Act extends to all parts of England and Wales the rights and obligations long since enjoyed by property owners in London. Its long title is "An Act to make provision in respect of party walls, and excavation and construction in proximity to certain buildings and structures; and for connected purposes". The 1996 Act imposes obligations on property owners who wish to carry out building works (building owners) to serve a notice on any adjoining owner (or occupier, but for convenience I will refer only to owner) informing the adjoining owner of his intention to carry out certain specified works. There are three types of specified works. These are provided for in sections 1, 2 and 6 of the 1996 Act, covering, respectively, new building on the line of the junction between lands of adjoining owners, repair demolition rebuilding or alteration of an existing party wall or structure, and excavation (with or without construction) on any part of the building owner's land which is adjacent to a building or structure on an adjoining owner's land. The 1996 Act requires a building owner to serve an appropriate notice of his proposed works at least one month before undertaking

works covered by sections 1 and 6 of the 1996 Act, and at least two months before undertaking works covered by section 2 of the 1996 Act. This last notice is a "party structure notice", see s 3(1) of the 1996 Act. There is also provision under the 1996 Act for an adjoining owner on whom a party structure notice has been served to serve a counter notice specifying requirements of the adjoining owner in respect of the building owner's works.

22. There are minor differences in the regimes imposed by the 1996 Act in respect of the three types of specified works, but one matter is constant; if any dispute arises between the building owner and the adjoining owner, it is to be determined in accordance with section 10 of the 1996 Act. For these purposes a dispute may be an actual dispute, as where an adjoining owner does not agree that the building owner should carry out his proposed works, whether in whole or in part, or a deemed dispute. A dispute is deemed to arise in any case where the adjoining owner on whom a notice is served under section 3 or 6(5) of the 1996 Act does not himself serve a notice indicating his consent to the proposed works within 14 days of the service of the building owner's notice, or where the building owner on whom a counter notice has been served by an adjoining owner does not by notice indicate his consent to the adjoining owner's requirements, again within 14 days of the service of the counter notice.

23. The dispute resolution procedure provided by the 1996 Act is contained in section 10, of which the following sub-sections are relevant to the present case.

10. Resolution of disputes.

(1) Where a dispute arises or is deemed to have arisen between a building owner and an adjoining owner in respect of any matter connected with any work to which this Act relates either—

(a) both parties shall concur in the appointment of one surveyor (in this section referred to as an "agreed surveyor"); or

(b) each party shall appoint a surveyor and the two surveyors so appointed shall forthwith select a third surveyor (all of whom are in this section referred to as "the three surveyors").

(2) All appointments and selections made under this section shall be in writing and shall not be rescinded by either party.

…

(5) If, before the dispute is settled, a surveyor appointed under paragraph (b) of subsection (1) by a party to the dispute dies, or becomes or deems himself incapable of acting, the party who appointed him may appoint another surveyor in his place with the same power and authority.

…

(10) The agreed surveyor or as the case may be the three surveyors or any two of them shall settle by award any matter—

(a) which is connected with any work to which this Act relates, and

(b) which is in dispute between the building owner and the adjoining owner.

(11) Either of the parties or either of the surveyors appointed by the parties may call upon the third surveyor selected in pursuance of this section to determine the disputed matters and he shall make the necessary award.

(12) An award may determine—

(a) the right to execute any work;

(b) the time and manner of executing any work; and

(c) any other matter arising out of or incidental to the dispute including the costs of making the award;

but any period appointed by the award for executing any work shall not unless otherwise agreed between the building owner and the adjoining owner begin to run until after the expiration of the period prescribed by this Act for service of the notice in respect of which the dispute arises or is deemed to have arisen.

(13) The reasonable costs incurred in—

(a) making or obtaining an award under this section.

(b) reasonable inspections of work to which the award relates; and

(c) any other matter arising out of the dispute,

shall be paid by such of the parties as the surveyor or surveyors making the award determine.

…

(15) Where an award is made by the third surveyor –

(a) he shall, after payment of the costs of the award, serve it forthwith on the parties or their appointed surveyors; and

(b) if it is served on their appointed surveyors, they shall serve it forthwith on the parties.

24. It is important to note that the provisions of section 10 arise when a "dispute arises or is deemed to have arisen". Once there is such a dispute, whether actual or deemed, either a single agreed surveyor or three surveyors are appointed, or, strictly, in the case of the third surveyor, selected. Where there are three surveyors two of them will have been appointed by (or occasionally for) one of the owners, whether building owner or adjoining owner. These party-appointed owners do (or should) not however act in any sense as agent for the owner appointing them. As the Earl of Lytton said when introducing the Party Wall Bill in the House of Lords on 31 January 1996:

> "The duty of party wall surveyors is quasi-arbitral. Once appointed they have a duty of act properly in the interests of both parties as statutory surveyors, which is a most important safeguard."

It is in keeping with the quasi-arbitral nature of the party wall surveyor's work that s10(2) of the 1996 Act provides that an appointment or selection of a party wall

surveyor once made may not be rescinded by either party, whether building owner or adjoining owner. The 'important safeguard' referred to by the Earl of Lytton is well and widely understood. In the RICS 6th edition guidance notes it is stated:

> "The appointed surveyor cannot be discharged by an owner. The appointment only comes to an end if the surveyor dies, or becomes or declares himself or herself incapable of acting. This ensures that the surveyor is able to conclude an award without undue interference from the appointing owner."

The parties' contentions

25. Mr Antino, the First Defendant, has undertaken the advocacy on behalf of both the Defendant surveyors. The prohibition on the rescission of appointments or selections of party wall surveyors imposed by s10(2) of the 1996 Act are at the heart of Mr Antino's contentions. Mr Antino refers to the passage at para 7-24 of the 'The Law and Practice of Party Walls' by Nicholas Isaac:

> "That the parties cannot rescind appointments under section 10 is regularly a source of dismay to appointing owners who, for what reason, have fallen out with "their" surveyors. However, it is clear that appointments (and selections) under section 10 are indeed irrevocable, and, unless a surveyor is willing to declare himself incapable of acting, (i.e. under section 10(5)), his appointing owner has no choice but to continue to deal with that surveyor."

With respect to the selection of a third surveyor, Mr Antino refers to my judgment in *Reeves v Young, Young and Antino* (3 January 2017), in which the submission of counsel for the Defendants that as s 10(2) prohibited the rescission of the selection of a third surveyor 'by either party' such a selection remained open to be rescinded by the party wall surveyors, was rejected. This judgment, suggests Mr Antino, is a 'vehement' upholding of the no-rescission principle of s 10(2).

26. It is Mr Antino's contention that the agreement between the respective owners embodied in the Consent Order amounts to a rescission of the appointments of himself and Mr Redler and of the selection of Mr Stevens. A rescission which is ineffective as a consequence of the provisions of s 10(2). As Mr Antino puts it in his witness statement:

> "33. Following the two injunctions the claimants proposed mediation to resolve the litigation. This culminated in an undated consent order which seeks to replace the tribunal of surveyors with a single surveyor (Mr J Goddard) under s.10(1)(a) contrary to s.10(2) as explained above. Mr Goddard declined the invitation.
>
> 34. Accordingly, the tribunal are seized of the disputes that crystallised during their appointment and only they can deem themselves incapable of acting under s.10(5). They are bound to follow their statutory duty to resolve disputes including assessing their fees and disbursements."

'The tribunal' or surveyors is, of course, Mr Antino and Mr Redler as party-appointed surveyors and Mr Stevens as third surveyor.

27. For the Claimants Mr Isaac submits that section 10(2) has no application in the current situation, preventing as it does "appointments and elections" being "rescinded by either party". Mr Isaac makes three submissions:

> (1) The effect of the Consent Order is, explicitly, to resolve all disputes between the Takhars and Mohameds under the Act. The premise for the appointment of surveyors under section 10(1) of the Act is a dispute arising or being deemed to arise, and the sole purpose of those surveyors is to resolve that actual or deemed dispute. By agreeing that all disputes under the Act are resolved, the parties removed the very basis for the appointment of Mr Antino, or the selection of Mr Stevens, rendering them immediately redundant. Section 10(2) is not engaged because the Consent Order disengages section 10 completely;
>
> (2) It was open to the Mohameds and Takhars to contract out of the section 10 dispute resolution procedure, see *Dillard v F & C Commercial Holdings Limited* [2014] EWHC 1219 (QB), something the Consent Order explicitly did;
>
> (3) In any event, if and to the extent that the Consent Order had the effect of rescinding the appointment of Mr Antino and/or the selection of Mr Stevens, it was not a rescission by *either* party, but a rescission by *both* parties. The sole purpose of section 10(2) is to prevent a single party sacking or purporting to sack the surveyor he has appointed, or the third surveyor the appointed surveyors have selected. It is plainly not intended to prevent the building owner and adjoining owner, acting together, replacing the tribunal of surveyors.

28. The heart of the Claimants' case is submission (1) to which I will return. As to submission (2) Mr Isaac relies on the comment, at paragraph 17(j) of the judgment of Akenhead J in the *Dillard* case, where he states:

> "(17) It is accepted rightly that the parties may contractually opt out of the Act, as the parties have done here in part at least relating to the relief set out in Clauses 7 and 10 of the Deed."

Mr Antino is greatly offended by the suggestion that owners may "contractually opt out of the Act", and understandably so. However I do not see that *Dillard v F&C Commercial Property Holdings Ltd* is authority for a proposition as wide as Mr Antino fears it to be; the words quoted should not be taken at their face value. It is not necessary, fortunately, for me to analyse the *Dillard* decision or to comment on it at any length. It was an interim appeal on the construction of a deed, and the passage at paragraph 17(j) was a reference to matters accepted by counsel on which the Judge placed reliance in forming his view as to the proper interpretation of the deed in question. The phrase "contractually opt out of the Act" is, in essence, shorthand for the proposition, important in the present case, that the owners may by agreement ensure that the dispute resolution procedure provided by s 10 of the Act is not engaged. The basis on which owners may ensure that s 10 is not engaged is the subject of Mr Isaac's first submission.

29. Submission (3), that s 10(2) does not preclude rescission of party wall surveyors' appointments by *both* parties acting in concert is indeed challenging. Instinctively this is difficult to accept. True, the Act refers to rescission of an appointment by *either* party and does not expressly preclude rescission by both parties acting together but the

draughtsman here surely had in mind that each party makes a separate appointment. There are no joint appointments, and there is no obvious basis on which either party might ever be involved in the rescission of the appointment of the other party's surveyor. There is a joint selection of the third surveyor, but that is a selection by the appointed surveyors and not the parties. But the essence of the objection to the submission must be that on which the submission in *Reeves v Young, Young and Antino* that it was open to both appointed surveyors to rescind the selection of the third surveyor was rejected, namely that the clear purpose of the Act is to ensure that once appointed or selected, party wall surveyors must be allowed to carry out their quasi-arbitral duties under the Act without pressure from the respective owners. The owners may riposte that the dispute resolution procedure is in place for their purposes. There is no specific public interest dimension to the resolution of party wall neighbour disputes (I exclude the general public interest in the peaceful resolution of all civil disputes) and there is no obvious basis on which it would be right and proper to prevent both owners acting jointly from rescinding the appointment of one or both the party-appointed surveyors or the selection of the third surveyor in circumstances where both owners considered that it was in their respective interests to do so. I rather doubt, however, that such a riposte meets the objection. The purpose of the Act is to ensure that in conducting their quasi-arbitral duties the party wall surveyors are to be free from threats or other pressure from the owners, whether individually or jointly.

30. For the present however I note that the Agreement embodied in the Consent Order did not purport to rescind the appointment of any of the surveyors. Furthermore, this third submission of Mr Isaac's was not a submission that was canvassed in any detail at the hearing. Its determination may therefore await a more suitable occasion with full argument.

31. I return to submission (1). The 1996 Act provides a mechanism for resolving disputes; there must be a dispute for the resolution mechanism to be engaged. Once there is a dispute, whether actual or deemed, the resolution mechanism provided by the Act is mandatory. Section 10(1) is in mandatory terms, and engages "[w]here a dispute arises or is deemed to have arisen between a building owner and an adjoining owner" and providing that the owners, as 'parties' 'shall concur in the appointment of one surveyor' or 'shall [each] appoint a surveyor'. But there must be a dispute before any appointments are made.

32. The issue between the parties in the present proceedings may therefore be formulated in this way: is it open to the owners to proceed on the basis that there is no dispute for the purposes of section 10 because they have agreed between themselves to settle any differences they may have by way of some form of alternative dispute resolution? This question falls to be considered in two different contexts.

33. The first context, first because it is the more likely to arise, is an agreement to deal in a particular way with any differences between the parties which may arise in the future. In such cases I see no difficulty in answering the question formulated in the affirmative. The officious bystander might insist that there was a dispute between the parties, however they might wish to call it, and that s 10 must be engaged. However, the parties may properly respond that there is no dispute for the purposes of s 10 because, they having made contractual arrangements for the dispute to be determined, it must be considered as determined and therefore not a dispute. That was the position in the

Dillard v F&C Commercial Property Holdings Ltd case, where the court accepted that the dispute resolution provisions of the Deed took any difference between the parties out of the scheme of the 1996 Act. (The difficulty in the *Dillard* case was that the Deed also expressly required the parties to adhere to the requirements of the 1996 Act, with express provision for the building owner to pay the adjoining owner's party wall surveyor's costs, a difficulty that does not arise in the present case.) To the extent therefore that the Agreement embodied in the Consent Order covers future differences between the parties, the Claimants must be entitled to the relief they seek.

34. The second context is where the parties reach agreement only after a dispute has arisen and where the statutory dispute resolution procedure has been brought into action, but as yet no Award has been made. In this context the party wall surveyors are in place and their task is governed by s 10(10)(11) of the 1996 Act. By virtue of s 10(10) the surveyors (or any two of the three of them) are to settle by award any matter which is connected to any work to which the 1996 Act relates and "which is in dispute between the building owner and the adjoining owner". Alternatively, the third surveyor may be called upon under s 10(11) to determine "the disputed matters". These matters must relate back to any matter described in s 10(10). Accordingly a consideration of the present argument does not need to differentiate between s 10(10) settlements or s 10(11) determinations.

35. The present tense is used in s 10(10). What has to be settled by award is any relevant matter which <u>is</u> in dispute between the owners, not any matter in respect of which the surveyors have been appointed or selected under s 10(1). It follows that if a matter ceases to be in dispute there is no dispute remaining to be settled by the surveyors. It will be a relatively rare case where parties who have been in dispute (or deemed dispute) reach agreement and thereby take away from the surveyors the need to make an award. But I see no basis for the argument that the surveyors simply must proceed to make an award about any matter that was previously but is no longer in dispute, and that this imperative either precludes the parties from reaching agreement, or makes unlawful any agreement they do make.

36. The argument that the 1996 Act requires the surveyors to proceed to an award even where the parties have reached agreement would be wholly against the general principle that parties who are sui juris are free to make such agreements as they wish to make, provided that they are not illegal in nature. It is also against the clear policy of the CPR for the court either to restrain two parties from reaching an agreement on any subject matter which has been referred to party wall surveyors under the 1996 Act, or to hold unlawful and therefore unenforceable any agreement they do happen to make, simply on the basis that a reference has been made to the surveyors. Very clear statutory words would be required before the court would act in this way, and there are no such words in the 1996 Act.

37. The distinction may be drawn between agreements between parties which conclude a substantive resolution of the parties' differences and those, such as the present, which do not resolve those differences but provide for the differences to be determined outside the 1996 Act. I do not however see this to be a valid distinction for present purposes. The Agreement embodied in the Consent Order has the effect of ending the dispute for the purposes of the 1996 Act even though some time will necessarily pass before the parties achieve their substantive resolution through their own alternative

procedure. It would wholly inappropriate for the court to step in and interfere with the parties' contractual arrangements. Courts today are enjoined to encourage private resolution of litigation disputes, and there is no obvious reason why a different approach should be adopted to disputes which come within the 1996 Act dispute resolution procedure.

38. Accordingly, I conclude that to the extent that the Agreement embodied in the Consent Order covers matters in respect of which the party wall surveyors have been appointed, the Claimants are entitled to the relief they seek.

Party Wall surveyors' fees

39. The real problem which has precipitated this litigation is the question of fees. This is a matter which was referred to during the hearing, but the details have not been discussed; the problem has been more in the nature of an elephant in the courtroom than an issue under investigation. Certainly in the case of Mr Antino, and very probably in the case of Mr Stevens, work has been undertaken, the fees for which would in the ordinary course of events be the subject of an Award requiring payment by one owner or the other or, sometimes, payment shared between the owners. Such an Award is perfectly proper. Express provision for an award to determine the costs of making the award is found at s 10(12)(c) of the 1996 Act.

40. It should be recorded that the Claimants reject any suggestion that the Agreement embodied in the Consent Order has as an object an intention to avoid the payment of fees reasonably incurred before the making of the Agreement. The Claimants point to the fact that the third of the current disputes to be determined by the Agreed Surveyor is an assessment of the reasonable fees they should pay to the adjoining owners in respect of the fees of Mr Antino, Mr Calder (the engineer) and Mr Stevens. There is no provision in the Agreement requiring the adjoining owners to pay on those fees to the professionals concerned. In the ordinary course of events, however, it is to be anticipated that the adjoining owners will pay the fees of their appointed surveyor and any engineer engaged by them, and that the building owners will reimburse them for such payments. This provision of the Consent Order is consistent with the normal expectation on the question of fees. There is also the implication in the Consent Order that the adjoining owners will also meet the third surveyor's fees, or part of them, and thus expect reimbursement of this expenditure by the building owners.

41. Nevertheless, there is a concern on the part of the Defendants that their fees will not be paid in the absence of an Award requiring payment. Where fees are the subject of an Award the sum involved may be recovered summarily as a civil debt under s 17 of the 1996 Act. Mr Antino submitted that the position a party wall surveyor might find himself in, without an Award in place (ie being unable to recover payment for work done under the provisions of s 17), was a factor to be considered when determining whether an agreement between owners resolving current disputes should be held to be unlawful.

42. No court will lightly countenance an owner avoiding the payment of the reasonable fees of the party wall surveyors by reaching an agreement to settle disputes which have been properly referred for an award. In the absence of an Award it is unlikely that s 17 may be employed by an unpaid party wall surveyor for recovery in a Magistrates Court.

But there remain the civil courts, both High Court and County Court, where recovery might be made. For the owner-appointed surveyors it will be a matter of contract. It is for the surveyor to ensure that his terms of appointment properly cover the payment of fees. Mr Antino expressed concern that his terms of appointment, apparently in common usage (although I have not seen them), provide for the payment of fees on the making of an Award. Mr Antino is concerned that if an Agreement such as the present precludes the making of an Award it will prevent fees for work done becoming due and payable.

43. That is not necessarily the case. Even where the terms of appointment link the payment of fees to the making of an Award, there may be circumstances in which a party wall surveyor will be entitled to a recovery where the appointing owner acts so as to prevent an Award being made. As with all matters contractual, much will depend on the terms of the contract of appointment. That is a private matter between appointing owner and party wall surveyor, and it is not for the court to opine on matters not before it. The observation might nonetheless be made that the wise surveyor will ensure that his appointment contains a term requiring payment of fees for work properly done in the furtherance of the making of an Award even where that Award is not, for whatever reason, in fact made.

44. The third surveyor is in a different position. He is selected by the owner-appointed surveyors and will not in the ordinary course of events have a contract of appointment with an owner. It is at least theoretically possible that some provision might be made to cover the third surveyor in an owner-appointed surveyor's contract of appointment, but such provision is unlikely. The 1996 Act is however alive to the risk of non-payment inherent in the position of the third surveyor. By s 10(15) the third surveyor is put in a similar position to many an arbitrator and is entitled to withhold his award until he has been paid:

> "(15) Where an award is made by the third surveyor –
>
> (a) he shall, after payment of the costs of the award, serve it forthwith on the parties or their appointed surveyors; and …

45. Section 10(15) is plainly of no avail when an agreement is reached between the owners which results in no award being made. One approach is to require payment, by way of deposit, in advance. The court is aware of instances where third surveyors have, by award, given directions requiring the deposit of funds to meet the costs of a pending award, in reliance on s 10(12)(c) of the Act. I make no comment as to the propriety of such awards.

46. For completeness I would observe that in some (I suspect, rare) cases the third surveyor may be called upon by an owner to make an award under s 10(11). It would presumably be open to the third surveyor to reach an agreement as to his (or her) fees with the owner calling on him for an award.

47. I have made the above observations in response to Mr Antino's submission that the possibility that a party wall surveyor may be denied payment for work done before the respective owners conclude an agreement, which determines their disputes, should impact on the determination of the present issue. The short answer to this submission is that the issue must be determined on the wording of the statute without reference to

payment of fees to party wall surveyors. The proper approach to the interpretation of the 1996 Act cannot be influenced by issues as to costs or fees. Such issues comprise an area best left to the RICS as the relevant professional body.

48. After the conclusion of submissions Mr Antino forwarded me a carefully redacted letter suggesting that the RICS will consider for disciplinary purposes complaints from owners that requests have been made for payment outside an Award. Mr Antino asks me to consider this letter in addition to and in support of his submissions. I have considered the letter.

49. The relevant rule is Rule 3 (Ethical behaviour) which provides: "Members shall at all times act with integrity and avoid conflicts of interest and avoid any actions or situations that are inconsistent with their professional obligations". Plainly the enforcement of this Rule is a matter for the RICS disciplinary body and much will turn on the precise facts, which are not apparent from the letter. It is understandable that Rule 3 might be breached if a surveyor requests money from an owner which has not been included in an Award, but it may be inferred that an Award has been made and the request is for payment over and above the sum awarded by way of fees.

50. Whether Rule 3 is breached where the request for money from an owner is made in circumstances where the parties were aware that work was being done towards an award but reached an agreement which prevented an award being made is quite another matter. Similarly, a contract which requires the payment of fees where the fees in question are not covered by an award may or may not breach Rule 3 depending on the scope and nature of the award. There is a clear difference between seeking to impose an obligation to pay fees which have been expressly considered and rejected in the making of an award (whether on the basis that the fees are excessive, or on the basis that the fees are sought for work not properly undertaken in respect of the matters in dispute), and an obligation to pay reasonable fees for work properly undertaken in the preparation of an award which is then rendered unnecessary by the parties reaching agreement as to the (former) dispute. Such matters are almost always fact-sensitive.

50. For the present it is sufficient for me to state both that professional disciplinary concerns cannot impact on statutory interpretation and that the nature of Rule 3 is not such that the interpretation placed on section 10 in this judgment will present the reasonable and competent party wall surveyor with any difficulty.

51. In the circumstances, the Court will grant the Claimants the relief they seek. I hope that it will be possible to resolve such matters as the precise terms of the Order, and in particular any issues on costs, electronically and so avoid the need for a further hearing.

13 December 2017

Annexure : Tomlin Order approved by the Court on 11 May 2016

IN THE COUNTY COURT AT CENTRAL LONDON

Claim Numbers: B20CL134
C20CL012
C20CL055
C20CL044

BETWEEN:

LAHRIE MOHAMED
SHEHARA LAHRIE

The Mohameds

And

SUKHBINDER SINGH TAKHAR
IQBAL KAUR TAKHAR
PIRTHIPAL SINGH TAKHAR

The Takhars

UPON the parties having agreed the terms set out in the schedule hereto and BY CONSENT IT IS ORDERED THAT:

1. All further steps in the above-mentioned proceedings be stayed save for the purposes of carrying into effect the terms set out in the said schedule, for which purpose the parties or either of them have liberty to apply; and

2. There shall be no order as to costs.

SCHEDULE

1. The parties make this agreement in full and final settlement of all matters between them to date save for those explicitly mentioned below, and is in resolution of all disputes between them under the Party Wall etc. Act 1996 ("the Act").

2. The parties agree that all future disputes which would normally be resolved by an award under the Act shall be resolved by an independent surveyor appointed jointly by the parties as set out below ("the Agreed Surveyor"), and who shall resolve (1) the disputes set out below, and (2) any future party wall disputes between the parties arising out of the current works being carried out by the Mohameds as if he were an agreed surveyor appointed under section 10(1)(a) of the Act.

3. The parties agree to use their best endeavours to communicate with and resolve disputes themselves prior to referring any dispute to the Agreed Surveyor.

Appointment of Agreed Surveyor

4. The Agreed Surveyor shall be appointed by agreement between the parties, or in default of agreement within three days of the date hereof, shall be appointed by the President for the time being of the RICS, save that President shall not appoint any of the following, namely:

(1) Alistair Redler, Michael Osborn, Philip Antino, Raymond Stevens, David Maycox; or

(2) Any of the members of the RICS Boundaries and Party Wall Panel or working group named in the 6th edition of the RICS guidance note on "Party Wall legislation and procedure" and who are listed on page vi thereof; or

(3) Chris Zurowski, Andrew Schofield or Graham North, being the current officers of the London Branch of the Pyramus & Thisbe club.

Current disputes to be determined by Agreed Surveyor

5. The disputes which shall be referred to the Agreed Surveyor for immediate determination are as follows:

(1) What monitoring and trigger action protocols are appropriate for notifiable works still to be carried out by the Mohameds;

(2) What damage has been caused to the Takhar's property as a consequence of the building works carried out so far by the Mohameds;

(3) What reasonable fees should be paid by the Mohameds to the Takhars in respect of the fees of (a) Philip Antino, (b) Leslie Calder, and (c) Raymond Stevens down to and including the date hereof.

6. It is further agreed that the issue of compensation for the damage caused to the Takhar's property as a consequence of the Mohameds' building works shall be determined on completion of the works to the Mohameds' works in so far as the same are notifiable under the Act – it is envisaged that this will be on completion of the bulk excavation of the basement.

Resolution of disputes by Agreed Surveyor

7. In resolving the disputes referred to in paragraph 2 above, the Agreed Surveyor:

(1) shall make his determinations in writing;

(2) shall make such determinations as an expert, there being no right of appeal in respect of such determinations save only that either party shall have a right to appeal the determination of the current dispute set out in paragraph 6 which, for all purposes, shall be treated as an appeal under section 10(17) of the Act;

(3) may make determinations summarily (i.e. without requiring or permitting written submissions to be made);

(4) may give directions, impose time limits and in all other respects decide and direct how disputes to be decided by him shall be managed.

(5) shall in all respects act promptly, fairly and proportionately in relation to the parties and any disputes referred to him, in particular with a view to both enabling the Mohameds' works to proceed with all reasonable expedition, and to ensuring that those works do not cause unnecessary inconvenience to the Takhars, or damage to their property.

Determination whether payment of £50,000 should be made

8. The question set out below shall be referred to Gary Webber as a neutral evaluator ("the Evaluator") to adjudicate upon, and, in the event he is unwilling or unable so to act, Sara Benbow shall identify and nominate an appropriate third party who can undertake an independent evaluation in his place.

9. The question to be adjudicated upon, on the balance of probabilities, is: In the exchange of emails attached hereto, did the building owner, or the building owner's team, withhold any documents which should have been disclosed in accordance with the award dated 4th August 2015.

10. The Evaluator shall have an inquisitorial role, and may give such directions, impose such time limits and in all other respects decide and direct how the procedure for determination of the said question shall proceed.

11. If the question set out in paragraph 9 is answered in the affirmative, the Mohameds shall pay the Takhars (1) the sum of £50,000 within 14 days of the date of the determination, and (2) the costs of determining the question, such costs to be determined summarily by the Evaluator and paid within 14 days of such determination.

12. If the question set out in paragraph 9 is answered in the negative, the Takhars shall pay the Mohameds the costs of the determining the said question, such costs to be determined summarily by the Evaluator and paid within 14 days of such determination.

Signed.....

Lahrie Mohamed for and on behalf of the Mohameds

Signed.....

Pirthipal Singh Takhar for and on behalf of the Takhars